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Criminal Law—Instruction Incomplete as to Fact

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pardon of a prior offense would not serve to destroy the historical effect of the conviction thereof.

In *State ex rel. Coole v. Sims*, 133 W. Va. 619, 629, 58 S.E.2d 784, 790 (1950), it was said: "It will not do to say, nor do any of the authorities say, that the granting of a pardon wipes out the conviction and renders the party innocent dating back to the time he was convicted Neither the Governor of this State, nor the Court of Claims, nor the Legislature, has any constitutional power to pass upon the guilt or innocence of a person charged with a crime. That power rests, under our Constitution, in the judicial department of the State government."

Executive clemency, while being a constitutional power, not subject to legislative control, is however, subject to legislative regulation which prescribes that a second conviction, without excepting pardon or parole from the first, shall incur the penalty prescribed in the habitual criminal statute. *State v. Fisher, supra*.

In making the decision in the instant case, our court goes along with the weight of authority. See *People ex rel. Prisament v. Brophy*, 317 U.S. 625 (1942). The minority view is based upon the theory that an unconditional pardon serves to wipe out all the effects of the prior conviction and makes the offender a "new man", just as though he had never committed the crime. *State v. Childers*, 197 La. 715, 2 So.2d 189 (1941). The instant case discredits such a position by pointing out that the criminal character or habits of the individual, the chief postulate of habitual criminal statutes, is often as clearly disclosed by a pardoned conviction as by one never condoned.

E. W. K.

CRIMINAL LAW—INSTRUCTION INCOMPLETE AS TO FACT.—On trial for murder, *D* relied on self-defense. He was being treated in a hostile and threatening manner by two persons acting in concert, which led to the fatal shooting of one of them. *D* was convicted of second degree murder. One point of error assigned in the appellate court was the giving of an instruction which stated his right of self-defense against the deceased only, omitting any mention of the fact that there were two parties acting hostilely toward him.

He contended that the instruction should have told the jury that if he was threatened by either or both of these persons, he had the right of self-defense against either or both of them. However, this omitted factual situation was fully set out in another instruction. *Held*, that the instruction was merely incomplete, and the incompleteness was remedied by the other instruction. *State v. Harlow*, 71 S.E.2d 330 (W. Va. 1952) (3-1 decision).

The law is well settled in this jurisdiction, as well as in most others, that a nonbinding instruction merely incomplete (as contrasted with inconsistent or erroneous instructions) will be aided by another instruction which supplies the missing element, and that instructions are to be read and construed as a whole.

The first West Virginia case found so holding is *State v. Prater*, 52 W. Va. 132, 43 S.E. 230 (1902). There an instruction did not state that the jury could acquit the defendant. However, another instruction told the jury that they should find the defendant not guilty unless they believed him guilty beyond a reasonable doubt. The court held that the incompleteness in the former instruction was cured by the latter.

There are many other cases in this jurisdiction which follow the rule. However, all the earlier cases seemingly differ from the instant case [and *State v. DeBoard*, 119 W. Va. 396, 196 S.E. 349 (1937)], in that the instructions held incomplete in the earlier cases appear to contain incomplete statements of the law applicable to the facts in dispute rather than incomplete statements of the undisputed facts. *State v. Cottrill*, 52 W. Va. 363, 43 S.E. 244 (1902) (omitted that self-defense can be shown by state's evidence); *State v. Dodds*, 54 W. Va. 289, 46 S.E. 228 (1903) (stated presumption of guilt of murder, but failed to show how presumption of guilt of murder could be rebutted); *Normile v. Wheeling Traction Co.*, 57 W. Va. 132, 49 S.E. 1030 (1905) (omitted law as to contributory negligence); *State v. Clifford*, 59 W. Va. 1, 52 S.E. 981 (1906) (neglected to say that to bring in a verdict, the jury must believe the defendant guilty of the offense named in the verdict); *Connolly v. Bollinger*, 67 W. Va. 30, 67 S.E. 71 (1910) (failed to define the term, "valid marriage contract"); *Powell Music Co. v. Parkersburg Trans. & Stor. Co.*, 75 W. Va. 659, 84 S.E. 563 (1915) (neglected to say that defendant would be liable only if he failed to exercise

reasonable care); *State v. Snider*, 81 W. Va. 522, 94 S.E. 981 (1918) (failed to distinguish between two degrees of statutory murder).

The rule was extended in *State v. DeBoard*, *supra*. There the defendant was being menaced by several individuals. One instruction given indicated that there was but one person (the deceased) molesting the defendant, and stated the defendant's right of self-defense against him alone. The instruction was held curable. The court settled this and the instant case by the same rule as applied in the earlier cases, without distinguishing them, so that it now seems well established that the incomplete instruction rule has been extended to include instructions incomplete as to fact.

The policy behind holding an incomplete instruction curable is that the jury cannot be misled by such an instruction because it does not actually misstate anything, but merely has an omission which is supplemented by another instruction. In extending the rule to factually incomplete instructions, it would seem that the distinction should have been recognized and that the policy on which the rule is based should have been considered.

R. A. K.

DIVORCE—CRUEL OR INHUMAN TREATMENT AS GROUND FOR.—Proceeding by wife against husband for separate maintenance on ground of cruel or inhuman treatment under W. VA. CODE c. 48, art. 2, § 4 (Michie 1949). They were married in 1944. He began to treat her with coldness and indifference almost immediately. He refused to converse with her, failed or refused to come to meals and many times used profane language toward her. He refused to visit her while she was being treated at a hospital. *H*'s demurrer was overruled and the trial chancellor granted the decree. *H* appealed. *Held*, that the conduct of the husband did not constitute cruel or inhuman treatment. Decree reversed; cause dismissed. *Davis v. Davis*, 70 S.E.2d 889 (W. Va. 1952).

It should be noted that the decision in the above case does not expound new law in West Virginia. The law on this subject seems to be well settled and has been so since the case of *Goff v. Goff*, 60 W. Va. 9, 53 S.E. 769 (1907). The purpose of this comment then is not to bring new law before the bar, but merely to point out and